

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*NARAYAN v MINISTER FOR IMMIGRATION & ANOR* [2006] FMCA 658

MIGRATION – Spouse visa – Migration Review Tribunal – whether jurisdictional error – finding of ‘no probative evidence’ of genuine spouse relationship – probative evidence available – whether jurisdictional error – domestic violence.

*Migration Act 1958*, s.66

*Migration Regulations 1994*, reg.1.15A(1A), 1.15A(3), 1.21, 1.23, 1.24, 1.25, 1.26, Sch 2, cl. 820.211, 820.221

*Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251

*Cakmak v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 257

*Kozel v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 658

*Sok v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 56

*VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255

*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

|                          |                                                  |
|--------------------------|--------------------------------------------------|
| Applicant:               | AVINESH NARAYAN                                  |
| First Respondent:        | MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS |
| Second Respondent:       | MIGRATION REVIEW TRIBUNAL                        |
| File Number:             | MLG 287 of 2005                                  |
| Judgment of:             | McInnis FM                                       |
| Hearing date:            | 9 December 2005                                  |
| Date of Last Submission: | 19 December 2005                                 |
| Delivered at:            | Melbourne                                        |

Delivered on: 5 May 2006

**REPRESENTATION**

Solicitor for the Applicant: Mr T. Fernandez

Solicitors for the Applicant: T.A. Fernandez

Counsel for the Respondents: Mr C. Horan

Solicitors for the Respondents: Australian Government Solicitor

**ORDERS**

- (1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 22 February 2005.
- (2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.
- (3) The First Respondent pay the Applicant's costs.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
MELBOURNE**

**MLG 287 of 2005**

**AVINESH NARAYAN**  
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS**  
First Respondent

**MIGRATION REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

1. The Applicant seeks judicial review of a decision of the Migration Review Tribunal (the Tribunal) dated 22 February 2005. The Tribunal affirmed a decision of the delegate of the First Respondent refusing to grant to the Applicant a temporary spouse visa.
2. The Applicant is a citizen of Fiji who arrived in Australia on 16 January 1999 as the holder of visitor visa. On 2 March 1999 the Applicant married an Australian citizen, Sandhya Gaundar (the nominator).
3. On 29 March 1999 the Applicant applied for permanent residence based on his marriage to the nominator. The application comprised an application for a temporary spouse visa and an application for a permanent spouse visa.

4. An interview with the nominator was conducted by an officer of the First Respondent's department on 11 June 1999. A file note of that interview appears at Court Book page 43 and relevantly sets out the following:-

*"She stated that she wished to report a contrived marriage.*

*I asked her to explain what she meant and who the marriage was between.*

*She said that she was forced into a marriage with Avinesh by her parents.*

*She stressed it was an arranged marriage, she didn't want to marry Avinesh but she had no choice.*

*She claims that Avinesh told her that he only married her so he could stay in Australia and he would leave her as soon as he gets his visa.*

*I asked her if she can prove that he said this. She said no.*

*I noticed that she was holding hands with the male. I said are you two in a relationship. She said yes. I asked have you been in this relationship since before your marriage. She said yes. I asked does your husband know about the relationship. She said yes."*

5. The file note records that during the interview a male person of Indian appearance attended along with a female person of Anglo-Australian appearance. The officer asked questions of the male person who preferred not to give his name. Questions were asked of the other female person who apparently stated that the Applicant was *"threatening all of us and we are very scared"*. Other questions were then addressed to the nominator concerning her marriage. Ultimately, the nominator on the same day formally withdrew her sponsorship of the Applicant. This appears in a handwritten file note dated 11 June 1999 (Court Book page 42). The file note would appear to be a file note written at the invitation of the officer of the First Respondent's Department. While the document was written the officer spoke with the male and female friends and according to the file note "explained the requirements of proving a contrived marriage". The file note then records:-

*“... They both stated that Avinesh is a violent person and they are concerned about their safety until he goes home. I told them that the withdrawal of the nomination does not guarantee that he will be sent home. I said that in fact there will probably be a few months before he is required to leave, and if he chooses to appeal our decision this could take even longer.*

*Sandhya, who had finished writing it by this stage, said this is not right, he is only here because I married him, he should be sent home straight away. I said, that is right, he is only here because you married him. If you knew before you married him that you did not want to marry him, you should not have gone ahead with the marriage. I said, this Department treats you as a mature adult, you signed the nomination forms, therefore you have to be responsible for withdrawing a nomination and accepting the consequences of your actions. Her friends both commented, but she had not choice, she was forced into the marriage.”*

6. Following the interview with the Departmental officer on 11 June 1999 correspondence was forwarded to the Applicant on 10 February 2000. That correspondence made reference to the following:-

*“This Department has information that you are no longer living in a genuine and continuing relationship with your nominating spouse, Sandhya Narayan.”*

7. The letter then referred to relevant legislation and requested that the Applicant provide certain documentation and provide a response within 35 days of the date of the letter.
8. There does not appear to be any response to that letter from the Departmental officer. In any event, on 21 March 2000 a delegate of the Minister refused to grant a temporary spouse visa to the Applicant. That decision was notified to the Applicant by letter dated 21 March 2000. According to the First Respondent's contentions there was some doubt as to whether the notification letter complied with s.66 of the *Migration Act 1958* (the Act) and the Applicant was "renotified" of the decision by a further letter dated 18 November 2003 (Court Book page 55). A comparison between the first notification letter, which appears at Court Book page 48, with the second letter dated 18 November 2003 reveals a different address for the Applicant. The record of decision of the First Respondent's delegate dated 21 March 2000 (Court Book pp.50-54) reveals that the Applicant did not respond

to the request for information and apparently did not participate in any interview with the delegate or indeed the officer who was the author of the file note referred to earlier in this judgment.

9. The Applicant presumably upon receipt of the second notification letter, made application to the Tribunal for review of the delegate's decision. The application dated 4 December 2003 (Court Book pages 57-61) includes the following statement in SECTION 8 in response to the question, *"Why do you think the DIMIA decision was incorrect?"*

*"The main reason I think the DIMIA decision is incorrect is: when DIMIA notified me of the primary decision I did not get their letter on time and was unable to state my side of the events to them. Due to this I was disadvantaged as the decision was made on the basis of incorrect allegations. I had a genuine marriage and I intend to prove this during the review."*

10. In the application for review the Applicant provided details of his agent. The Tribunal, by letter dated 10 November 2004, addressed to the Applicant's agent and to the Applicant invited the Applicant to give additional information relevant to the review of the decision. The Tribunal stated in its letter:-

*"Section 359(2) of the Migration Act allows the Tribunal to invite a person to give it additional information that is relevant to the review of a decision."*

*Accordingly, the Tribunal now invites you to provide the following additional information:*

- *The Tribunal invites you to provide further information on your relationship such as whether your relationship is ongoing, how you met and decided to marry and whether you live together as spouses."*

11. The Applicant was then given an opportunity to provide further information.

12. By letter dated 16 December 2004 the Applicant's migration agent made a submission to the Tribunal. Attached to the submission were the following:

- *Statutory declaration from Avinesh Narayan.*
- *Statutory declaration from his psychologist, Mr Edwin Kleynhans.*

- *Statutory declaration from registered nurse, Ms Maashneel Deo.*
- *Statutory declaration from medical practitioner – Dr C. Krishnamurthi.*
- 

13. The letter also enclosed support statements from the following:

- *Mrs Brenda Ratanatray.*
- *Mr Anish and Mrs Shobna Kumar.*
- *Mr Agya Ram and Ms Kushma Wati.*
- *Evidence that the marriage was genuine.*
  - *Statement from the priest.*
  - *Statement by Sandhya's parents.*
  - *Statement by David and Pam Hunt.*
  - *Statement by Ms Dorothy Phillips.*
  - *Bills.*
  - *Photos.*
  - *Video tape.*
- 

14. The letter from the Applicant's migration agent also asserted that the Applicant had *"suffered domestic violence at the hands of his wife"*. The agent's letter then states the following:-

*"In conclusion Avinesh's marriage was not a contrived one but a genuine one and both Avinesh and Sandhya had agreed to get married. Avinesh did not have any ill-intent when he got married and suffered because of the abuse from his wife. He feels that he is not been dealt with fairly in life and continues to suffer in silence. He is continuing with the professional help."*

15. The Applicant's statutory declaration comprised eight handwritten pages setting out in detail the material in support of the application. The declaration from the psychologist, Edwin Kleynhans, relevantly contained the following statement in response to the request for evidence indicating that the visa Applicant may be the victim of relevant domestic violence,

*" ... He spoke about his traumatic experiences with her (the nominator) alleging that she subjected him to domestic violence. Having assessed his symptoms for domestic violence and read the statement from his ex-employer, Mrs Brenda Ratanatray, I am of the opinion that he was subjected to domestic violence. He portrayed symptoms of a Major Depressive Disorder and Post*

*Traumatic Stress Disorder (PTSD), which are typical of domestic violence and trauma victims.”*

16. The psychologist made further reference to the claimed abuse and expressed the following conclusion:

*“The symptoms, particularly Depressed Mood and PTSD, he presented with, are normal of domestic violence. Having assessed him over time, I concluded that he must have been subjected to domestic violence at the hands of his wife. My diagnosis is also confirmed by the fact that his ex-employer suggested to him to take out an Intervention Order against his wife, as they have observed some tell tale signs (eg one day at work he was limping and was very distressed about his wife); in fact, they observed her abuse of him when she visited their cafe on a few occasions. Another symptom which confirms my diagnosis for domestic violence, is the fact that he is very apprehensive about his safety and security and was still having so-called flash backs about some of the abuse scenes (eg when she wanted to drive him over with her car). ...”*

*(Court Book page 88-89)*

17. The declaration from the registered nurse, Ms Deo (Court Book p.93) contains the following statement:

*“... On the ninth of June 1999 Sandhya had tried to run him over with their car. He was also subject to verbal abuse in his workplace on 10<sup>th</sup> June 1999, after which he was severely depressed and was concerned about his safety as he received threats on a number of occasions. ...”*

18. Ms Deo came to the conclusion that *"while in the abusive relationship Avinesh did not seek professional advice and help because he was bound by his custom to make his marriage work."*

19. The declaration from the medical practitioner (Court Book pp.102-103) referred to the issue of domestic violence and relevantly set out the following:

*“ his wife was never home. She would come at early hours of the morning and was distant towards him. If he questioned her she would explode and become abusive verbally.”*



20. Reference was made to a specific event on 9 June 1999 when the doctor records:

*“That night when his wife came home she was angry and abusive and threatened to kill him if he interfered again.”*

21. The doctor referred to his own observations noting the Applicant was depressed and *"He appears honest and sincere. There were no physical injuries to note."*
22. I have deliberately set out in some detail key references to the material which will become relevant when considering the claim made by the Applicant, the Tribunal's decision and the grounds relied upon in this application for judicial review.

### **The tribunal's decision**

23. In its decision the Tribunal referred to the documents filed by the Applicant in support of the application for review and after referring specifically to the Applicant's submissions and the declarations referred to earlier in this judgment then states:-

*“Taking into account the competent person declarations, the Tribunal finds that the visa applicant's claims do not meet the definition of domestic violence.*

- *Letter of 3 December 2004 from Mrs Brenda RATANATRY who stated that she had been the visa Applicant's employer and spoke highly of him. She said that he told her that his wife had left him and he was extremely depressed. She said that some time later he ‘came to work liming. He said that his wife had tried to ram him with the car.*
- *Certificate dated 6 November 2000 from Pundit Vishnu Kashyap, JP, Registered Minister of Religion certifying that, ‘I have solemnised the marriage ceremony for Avinesh NARAYAN and Sandhya GAUNDAR in accordance with Hindu rites at Logan West Community Hall, Logan, Qld’.*
- *Certificate of marriage of the parties, the registrar, Mr Gary Joseph BIDDULPH, stating that he solemnised the marriage of the parties on 2 March 1999.*

- *Letter (undated) from the nominator's parents stating that the parties moved into a property in Indooroopilly (Qld) after their marriage.*
- *Letter of support for the visa Applicant from David & Pam HUNT.*
- *Westpac Account Statement in the joint names of the parties totalling \$2446.25 as at 3 March 1999 and a further such statement dated 18 June 1999 showing a balance of \$0.59.*
- *Energex Electricity account dated 28 April 1999 in the joint names of the parties at their Indooroopilly address. The balance owing was \$15.45.*
- *Certificate of Motor Vehicle Registration in the parties' joint names at an address in Bellbird Park, Qld.*
- *Video cassette of the parties' wedding."*

24. The delegate stated that the visa was not granted because he concluded that the visa Applicant did not meet the requirements for the grant of the visa. This appears to have been largely premised on the nominator's claim to the delegate that "she was forced into a relationship with the Applicant and was in a relationship with another person prior to the marriage."

25. After those paragraphs the Tribunal then under heading 'Findings' states:-

#### *"FINDINGS*

*"At the time the visa application was lodged, Class TK contained the subclass 445 (Dependent Child) visa, subclass 820 (Spouse) visa and the subclass 826 (Interdependency) visa. The only subclass in which any claims have been advanced is subclass 820. There is no evidence to suggest that the visa applicant meets the criteria for any of the other subclasses.*

*Subclasses 820 and 826 were removed from Class TK with effect from 1 November 1999. A transitional provision is set out in regulation 5(5) of the Migration Amendment Regulations 1999 (No 13). This provides that the regulations in force immediately before 1 November 1999 continue to apply to this matter.*

*The criteria for a subclass 820 visa, relevant to this review, are set out in clauses 820.211(2) and 820.221(1) and clause 820.221A. The criteria can be posed as the following questions:*

- *Was the visa applicant the spouse of the nominator at the time of the visa application? **The parties were married to each other at the time of application. As to them being spouses see below.***
- *Was the nominator an Australian citizen, an Australian permanent resident or eligible New Zealand citizen at the time of the visa application? **Yes. The nominator was an Australian permanent resident at the relevant times.***
- *Was the visa applicant the holder of a 'substantive visa' at the time of application? **No, he just held a bridging visa.***
- *Does the visa applicant continue to be the spouse of the nominator at the time of decision? **The parties are still married to one another. As to them being spouses see below.***
- *Is the nomination of the visa applicant approved? **Yes.***

*Regulation 1.15A contains the test for determining whether one person is the 'spouse' of another person, whether in a married or a de fact relationship. In Nassouh's case the Federal Court held that regulation 1.15A(3) sets out mandatory considerations. Accordingly, the Tribunal, in forming an opinion whether a married relationship or de facto relationship exists must take into account the considerations set out in regulation 1.15A(3). These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons' commitment to each other.*

*Having regard to the considerations for a spouse relationship set out in regulation 1.15A at the time of the application and at the time of decision, the evidence and issues are discussed under the following headings:*

### ***The qualifying elements for a married relationship***

*The visa applicant and the nominator were married to each other on 6 November 2000. The Tribunal will take this as the marriage date as it comes from an official document whereas other wedding dates given by the parties do not have such support. In any event, at the time of application*

*the visa applicant and the nominator were married to each other in a marriage that is recognised as valid for the purposes of the Act. At the time of the decision they are still married to each other.*

***The financial aspects of the relationship***

*The parties had a shared account in the Westpac Bank but the amount in the account over 4 months was so small that it can be discounted. The parties also jointly registered their motor vehicle. Apart from this there is no other evidence under this heading.*

***The nature of the household***

*There is no evidence under this heading.*

***The social aspects of the relationship***

*There is evidence that the parties often visited the nominator's relatives and there are several letters of support from friends of the visa applicant. There is further evidence of their social life in their Video of the wedding.*

***The nature of the persons' commitment to each other***

*There is little evidence under this heading, the visa applicant accusing the nominator of domestic violence and the nominator endeavouring to oust the visa applicant from their home.*

***Whether there is a mutual commitment to a shared life as husband and wife to the exclusion of all others***

*There is no significant evidence under this heading (see also preceding paragraph).*

***Whether the relationship is genuine and continuing***

*There is no probative evidence that the parties' claimed relationship is genuine and continuing.*

***Whether the persons live together, or do not live separately and apart on a permanent basis***

*The parties have separated and the nominator's address is unknown. See also preceding paragraph.*

***Domestic Violence***

*The visa applicant asserted that he was the victim of domestic violence at the hands of the nominator. Under the regulations the determination that a person has suffered domestic violence is in the hands of a 'competent Person' as defined by regulation 1.21. This includes Mr Kleynhans as he is a registered psychologist under Victorian law (regulation 1.21(1)(a)(ii)).*

*Dr KRISNAMURTHI is a General Practitioner who comes within regulation 1.21(1)(a)(i) and is therefore a competent person for the matter at issue.*

*Ms Maashneel Priyanka DEO is a registered nurse who is a competent person under regulation 1.21(1)(a)(iii)(A). She, Mr Kleynhans and Dr Krishnamurthi submitted statutory declarations as required by regulation 1.26(a) (see paragraphs 12 and below.)*

### ***Genuine Relationship***

*The visa application is conditional on the visa applicant meeting the definition of 'spouse' a core criterion for the visa that is defined in regulation 1.15A. It provides that the Tribunal must be satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others (regulation 1.15A(1)(b)(i)), that the relationship is genuine and continuing (regulation 1.15A(1)(b)(ii)) and that they do not live separately and apart on a permanent basis (regulation 1.15A(1)(c)(ii)). In this context the decision of the Full Federal Court in Dhillon's case is relevant. It comments on the test for a genuine marriage, adopting the words of Street CJ in Cahill's case at page 458 that the correct test is that the parties 'have a mutual commitment to a shared life as husband and wife to the exclusion of others.' The only proper course, therefore, is to follow the regulations and apply them to the facts, excluding speculation and notions about idealised marriages from consideration. In the case at issue there is very little evidence that the parties had a genuine relationship as at the time of application, or at the time of decision. Whilst the visa applicant made claims under the Domestic Violence provisions of the regulations the Tribunal has found against this claim. Consequently the Tribunal must consider the matter without recourse to the domestic violence provisions in regulations 820.211(8) or (9).*

*Taking into account all of the evidence, which includes evidence provided to support the visa applicant's domestic violence claims (this being pertinent as to whether the visa applicant is in a*

*genuine spouse relationship with the nominator) and the limited evidence elicited under regulation 1.15A(3) The Tribunal finds that the visa applicant does not meet the definition of 'spouse' as set out in regulation 1.15A and therefore he does not meet the requirements of regulation 820.211 for the grant of the visa. In that regard it is noted that the visa applicant was more sinned against than sinning."*

## **Grounds of review**

26. The Applicant relied upon an amended application filed 19 May 2005. In that application the grounds relied upon are as follows:

*"1. The respondent has incorrectly interpreted the Regulations.*

### *Particulars*

- a) Given that the respondent found against the applicant's claim of domestic violence, the respondent erred in finding that 'it must consider the matter without recourse to the domestic violence provision'.*
  - b) And in further saying that in the circumstances the visa application is conditional on the visa applicant meeting the definition of spouse and then proceeding to examine whether or not the applicant met that definition in Regulation 1.15A.*
- 2) The respondent has failed to consider and correctly interpret relevant evidence in the context of the statutory framework relating to domestic violence.*

### *Particulars*

- a) The finding of the statutory declaration to Mr Kleynhans, Ms Deo and Dr Chandralekha Krishnamurthi did not prove that the applicant suffered domestic violence as required by Regulation 1.23(2)(b) was a finding that was not open to the respondent on the material and an incorrect interpretation of that Regulation.*
- b) Further, it was a finding that seems to suggest that a mention of 'there were no injuries to note' (Dr Krishnamurthi) and 'no signs of physical injury' (Ms Deo) domestic violence was synonymous with physical violence.*

*c) The respondent erred in concluding that the manner in which the competent persons had expressed their opinion negated the fear of apprehension which Regulation 1.23(2) (b) makes as essential element because the evidence on which those opinions were based, according to the respondent, did not establish domestic violence as defined. In so doing, the respondent failed to express an understanding of the object of presumptive fear or apprehension.*

*d) On seeking to place reliance on paragraph 27 of the decision of Meroka v MIMA (117 FCR 251) which paragraph refers to that Tribunal's reasons the respondent erred in failing to ask itself if that evidence was capable as a matter of law of supporting an opinion of domestic violence having occurred.*

*(e) The respondent has failed to consider the applicant's declaration and given a finding on that evidence pursuant to Regulation 1.25."*

27. A further particular was subjoined to ground 2 which related to a claimed failure to indicate the relevant provisions of the regulations that were applicable to the Applicant at the relevant time under which the claims were considered. That particular was not pursued at the hearing.
28. It should further be noted that reference to the 'respondent' in the grounds is presumed to mean a reference to the second respondent, namely the Tribunal.

## **Relevant regulations**

29. Regulation 1.15A sets out the interpretation of "spouse" for the purpose of the regulation. Reference is made to two persons being in a married relationship as described in subregulation (1A) or in a de facto relationship as described in subregulation (2). It is relevant for the present purposes to set out Regulation 1.15A(1A) which provides as follows:

*“(1A) **Persons** are in a married relationship if:*

*(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*

(b) *the Minister is satisfied that:*

(i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

(ii) *the relationship between them is genuine and continuing; and*

(iii) *they:*

(A) *live together; or*

(B) *do not live separately and apart on a permanent basis."*

30. It is also relevant to note that Regulation 1.15A(3) sets out the circumstances of a relationship to be taken into account, including the financial aspects of the relationship, the nature of the household, social aspects of the relationship and the nature of the person's commitment to each other.

31. **Regulation 1.21** provides the following interpretations:

*"competent person" means:*

(a) *in relation to domestic violence committed against an adult:*

(i) *a person registered as a medical practitioner under a law of a State or Territory providing for the registration of medical practitioners; or*

(ii) *a person registered as a psychologist under a law of a State or Territory providing for the registration of psychologists; or*

(iii) *a person who:*

(A) *is a registered nurse within the meaning of section 3 of the Health Insurance Act 1973; and*

(B) *is performing the duties of a registered nurse; or*

(iv) *a person who:*

(A) *is a member of the Australian Association of Social Workers or is recognised by that Association as a person*



*who is eligible to be a member of that Association; and*

*(B) is performing the duties of a social worker; or*

*(v) a person who is a court counsellor under the Family Law Act 1975; or*

*(vi) a person holding a position of a kind described in subregulation (2); or*

*(b) in relation to domestic violence committed against a child:*

*(i) a person referred to in paragraph (a); or*

*(ii) an officer of the child welfare or child protection authorities of a State or Territory.*

*"statutory declaration" means a statutory declaration under the Statutory Declarations Act 1959 .*

*‘violence’ includes a threat of violence.*

32. **Regulation 1.23** sets out for the purposes of the Regulations circumstances where a person is taken to have committed domestic violence and relevantly provides as follows:

*“When is a person taken to have suffered or committed domestic violence?*

*(1) For the purposes of these Regulations:*

*(a) a person (the alleged victim) is taken to have suffered domestic violence; and*

*(b) another person (the alleged perpetrator) is taken to have committed domestic violence in relation to the alleged victim;*

*if:*

*...*

*(f) the Minister is satisfied, for paragraph (1B) (a), that the alleged victim has suffered relevant domestic violence; or*

*(g) the Minister is required by subregulation (1C) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant domestic violence.*

*The reference to "relevant domestic violence" is further referred to in regulation 1.23(2)(b) as follows:*

*In subparagraph (1A) (b) (ii):*

*...*

*(b) a reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that causes the alleged victim, or a member of the alleged victim's family, to fear for, or to be apprehensive about, the alleged victim's personal well-being or safety."*

33. **Regulation 1.24** deals with the issue of evidence and provides as follows:

*"Evidence*

*(1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:*

*(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:*

*(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and*

*(ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory (other than a statement by the alleged victim); or*

*(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.*

*(2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:*

*(a) the same subparagraph of paragraph (a) of the definition of competent person ; or*

*(b) subparagraph (b) (ii) of that definition.”*

34. **Regulation 1.25** refers to statutory declarations by an alleged victim and provides as follows:

*“Statutory declaration by alleged victim etc*

*(1) A statutory declaration under this regulation must be made by:*

*(a) the spouse of the alleged perpetrator; or*

*(b) if the alleged perpetrator is in an interdependent relationship with a person -- that person.*

*(2) A statutory declaration under this regulation that is made by a person who alleges that he or she is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:*

*(a) set out the allegation; and*

*(b) name the person alleged to have committed the relevant domestic violence.*

*(3) A statutory declaration under this regulation that is made by a person who alleges that another person is the victim of relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) must:*

*(a) name that other person; and*

*(b) set out the allegation; and*

*(c) identify the relationship of the maker of the statutory declaration to that other person; and*

*(d) name the person alleged to have committed the relevant domestic violence; and*

*(e) set out the evidence on which the allegation is based.”*

35. **Regulation 1.26** refers to statutory declarations by competent persons as follows:

*“Statutory declaration by competent person*

*A statutory declaration under this regulation:*

- (a) must be made by a competent person; and*
- (b) must set out the basis of the competent person's claim to be a competent person for the purposes of this Division; and*
- (c) must state that, in the competent person's opinion, relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and*
- (d) must name the person who, in the opinion of the competent person, has suffered that relevant domestic violence; and*
- (e) must name the person who, in the opinion of the competent person, committed that relevant domestic violence; and*
- (f) must set out the evidence on which the competent person's opinion is based.”*

36. In **Schedule 2** of the Regulations provision is made for a subclass 820-spouse visa and relevantly **clause 820.211** provides as follows:

*“820.221(1) ...*

*(2) An Applicant meets the requirements of this subclause if the Applicant:*

- (a) would continue to meet the requirements of subclause 820.211 (2), (3), (4), (5) or (6) except that the sponsoring spouse has died; and*
- (b) satisfies the Minister that the Applicant would have continued to be the spouse of the sponsoring spouse if the sponsoring spouse had not died; and*
- (c) has developed close business, cultural or personal ties in Australia.”*

37. The criteria to be satisfied at the time of the decision is set out in **clause 820.221** relevantly as follows:

*“820.221(1) In the case of an Applicant referred to in subclause 820.211 (2), (3), (4), (5), (6), (7), (8) or (9), the Applicant either:*

*(a) continues to meet the requirements of the applicable subclause; or meets the requirements of subclause (2) or (3).*

*....*

*(3) An Applicant meets the requirements of this subclause if:*

*(a) the Applicant would continue to meet the requirements of subclause 820.211 (2), (3), (4), (5) or (6) except that the relationship between the Applicant and the sponsoring spouse has ceased; and*

*(b) either or both of the following circumstances applies:*

*(i) either or both of the following:*

*(A) the Applicant;*

*(B) a dependent child of the sponsoring spouse or of the Applicant or of both of them;*

*has suffered domestic violence committed by the sponsoring spouse;*

*(ii) the Applicant:*

*(A) has custody or joint custody of, or access to; or*

*(B) has a residence order or contact order made under the Family Law Act 1975 relating to;*

*at least 1 child in respect of whom the sponsoring spouse:*

*(C) has been granted joint custody or access by a court; or*

*(D) has a residence order or contact order made under the Family Law Act 1975; or*

*(E) has an obligation under a child maintenance order made under the Family Law Act 1975, or any other formal maintenance obligation.”*

## Applicant's submissions

38. The Applicant relied upon contentions of fact and law dated 9 June 2005 and 14 December 2005.

39. Essentially the jurisdictional errors were identified as arising out of the Tribunal finding at paragraph [13] of the Tribunal's decision where it states:

*“Taking into account the competent person declarations, the Tribunal finds that the visa applicant's claims do not meet the definition of domestic violence.”*

40. It is claimed that arising out of that finding the following errors have occurred:

*“a) The reference to the statutory declaration of Mr Kleynhans that ‘the visa applicant suffered a major depressive episode and PTSD’; the reference to the statutory declaration of Ms Deo that ‘the visa applicant showed no signs of physical injury’ and the statutory declaration of Dr Krishnamurthi that there were ‘no physical injuries to note’ seems to suggest that domestic violence was synonymous with physical violence.*

*b) The task of the Tribunal was not decide whether the visa applicant has in fact been the victim of domestic violence committed by the sponsoring spouse but rather to determine whether the statutory declarations are in conformity with the regulations in that it discloses an objective examination of the relevant evidence on which the opinion is based by necessary implication and does not exhibit any misconception in the formation of the requisite opinion.*

*c) The Tribunal failed to see that the deeming mechanism in regulation 1.23(1) of the regulations was activated, because its approach was to assess the evidence and concluding that it did not support the opinion of the competent person that it was not obliged to do. Consequently, in going behind the statutory declarations and making its own assessment, it erred. The Tribunal had failed to see the significance of the decision in Meroka's case.”*

41. It was submitted that the errors were errors of law and not errors in the process of fact finding, having found against the Applicant in respect of his claim under the domestic violence provisions and its finding

pursuant to Regulation 1.15A that "the parties have separated and the nominator's address is unknown" the Tribunal has not explained its basis for proceeding further in its finding and that it was argued is an incorrect interpretation of the Regulations.

42. During the course of submissions reference was made to the relevant Regulations. It was noted that in this instance the parties separated some time in June 1999 and the Tribunal decision was dated 22 February 2005 which was long after the relationship had ceased. It was submitted, however, that the Regulations contemplate a situation where an Applicant can still be granted a visa if the relationship has ceased and the Applicant claims that he or she has suffered domestic violence. It was argued that there is no duty on the part of the Tribunal to consider the relationship of a spouse as contemplated in Regulation 1.15A because the relationship had already ceased and the domestic violence provision should apply.
43. The Applicant referred the court to the decision of the Federal Court in *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251 (*Meroka*) noted in the summary of contentions. In that case the court considered a spouse visa and analysed the statutory scheme. Specific reference was made to the background in that case where the court states relevantly the following:

*"13 The Tribunal did not accept that the Applicant had suffered domestic violence, and decided that, as his marriage had ended, the Applicant could not otherwise satisfy the relevant criteria. Concurrently, the Tribunal found that the three statutory declarations submitted by the Applicant (one personally and two from 'competent persons') did not comply with the requirements of Div 1.5 of the Regulations and, as a consequence, the visa Applicant was not taken to have suffered domestic violence under Reg 1.23."*

44. The court set out extracts from the Tribunal decision in *Meroka* and noted that the Tribunal in that case in its reasons accepted that "non-physical conduct can come within the definition of domestic violence" though it concluded that the conduct alleged must have "the consequence of causing fear or apprehension about visa applicant's personal wellbeing or safety, must be sufficiently serious and be clearly proved by appropriate means to have occurred".

45. The court in *Meroka* then went on to state as follows:-

*“32 In my view, it is not sufficient for an Applicant to adduce statutory declarations from two "competent persons" each of which recites the possession of an opinion that relevant domestic violence has been suffered by the Applicant. Regulation 1.26(f) imposes the additional requirement that each statutory declaration must set out the evidence on which the competent person's opinion is based. The only purpose which can be imputed to the drafter who inserted that requirement is to provide an opportunity for objective examination of the evidence on which the opinion was based. Thus, if the competent person, in purporting to comply with Reg 1.26(f) were to refer to "evidence" which was quite unrelated to whether relevant domestic violence had been suffered by the Applicant, the alleged victim could not be "taken" pursuant to Reg 1.23 to have suffered domestic violence.*

...

*35 However, as already noted, the statement of opinion by a competent person will not cause the Applicant to be taken to have suffered domestic violence if the description of the nature of the violence, or the evidence on which the express or implied statement of opinion is said to be based, reveals that the competent person misconceived what the definition required for the formation of the requisite opinion. An examination of the forms completed by the competent persons in this case does not lead unequivocally to the conclusion that either of them misconceived what is involved in the concept of domestic violence.”*

46. Significantly the court in *Meroka* stated the following after considering submissions made for and on behalf of the parties:

*“49 I am not persuaded that the analysis of the declarations of the competent persons which the respondent imputed to the Tribunal in this case is correct. To assess whether an opinion has been expressed that an alleged victim has been caused "to fear for, or be apprehensive about" something requires an understanding of the object of the presumptive fear or apprehensiveness. However, at the end of the passage from its reasons quoted at [27] above, the Tribunal stopped short of expressing any such understanding. It confined itself to noting that, in *Malik, Wilcox J* explained that "there must be conduct, of one party towards the other which has the consequence of*



*causing fear or apprehension. That paraphrase of Wilcox J's reasoning omits to spell out that the fear or apprehensiveness must be about the victim's safety or well-being. In the context in which the Tribunal was speaking, the competent person's opinion must be that the victim had been caused to fear for, or be apprehensive about, his or her psychological safety or well-being. In my view, the preferable inference from their declarations is that each of Ms Sainovic and Mr Wa Mungai was of the opinion that the applicant had been fearful or apprehensive in that sense. Ms Sainovic asserted that he had been subjected to a systematic and constant "pattern" of verbal and emotional abuse which "he mostly feared". Mr Wa Mungai noted that the "calculated" psychological attacks by the applicant's wife had proved, according to the applicant, "to be more than a passing phase", and concluded "that Mr Meroka has suffered psychologically and the abuse has led to the break up of the relationship." In the absence of any other suggested reason for the breakdown of the marriage, it is difficult to resist the inference that both Ms Sainovic and Mr Wa Mungai considered that the applicant had escaped from it because he feared for his psychological well-being if it were to continue.*

*50 After a careful reading and re-reading of the Tribunal's reasons, I have been unable to dispel the impression that it declined to accept the declarations of Ms Sainovic and Mr Wa Mungai as activating the deeming mechanism in Reg 1.23(1), not because they failed to "state" the requisite opinions, but because the evidence on which those opinions were based did not, in the Tribunal's view, establish relevant domestic violence as defined. The Tribunal, I think, went beyond asking itself whether that evidence was capable, as a matter of law, of supporting an opinion that relevant domestic violence had been committed."*

47. When dealing with the issue of domestic violence it was submitted that the Applicant had complied with the Regulations in providing the appropriate statutory declarations from competent persons. It was submitted this is a mechanical process and, as I understand the submissions, it is argued that the competent person specifies the evidence on which he has come to a conclusion or opinion. It was noted that new regulation 1.24, which came into operation on 1 July 2005, has a subregulation, 1.24(1B) which provides as follows:

*"1.24(1) The evidence referred to in subparagraph 1.23(1)(g) is:*

*(a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:*

*(i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and*

*(ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory; or*

*(b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.*

... ”

48. It was argued that prior to that amendment, proof of domestic violence was regarded as mechanical proof in the sense that if the alleged victim had sworn a statutory declaration setting out the allegations and naming the person who committed the domestic violence on that person and provided appropriate statutory declarations by competent persons, then that would satisfy the requirements of division 1.5 of the Regulations. Criticism was then made of the Tribunal decision where it made a finding that "the visa applicant's claims do not reach a definition of domestic violence". It was argued no reference was made to the Applicant's own statutory declaration (Court Book page 66). That declaration which was handwritten and referred to earlier in the judgment was a detailed declaration which, it is submitted, covered all aspects referred to in Regulation 1.25 but was not considered by the Tribunal in reaching its decision. It was submitted that the Tribunal made reference to the material during the hearing and the court was directed to extracts in the transcript in the supplementary Court Book. Ultimately there was a failure by the Tribunal to refer to the Applicant's statutory declaration and therefore a failure to consider the statutory framework of division 1.5 of the Regulations.

49. In relation to the statutory declarations of competent persons, it was submitted that the Tribunal selectively referred to extracts from those declarations and then concludes the evidence does not prove the Applicant suffered relevant domestic violence. It was submitted that

there is a declaration by a competent person and evidence upon which the opinion is based. Once established, then it is sufficient to satisfy the requirements of the Regulations. The analysis of the declarations from competent persons by the Tribunal involves a selective reference to the extracts and reaching conclusions which were impermissible. It was noticed in passing that the Regulations define violence as set out earlier in this judgment but that "domestic violence" is not defined. In any event it was submitted the declarations submitted by the Applicant satisfactorily meet the requirements of the Regulations. Reference was made throughout submissions to declarations, extracts of which appear earlier in this judgment.

50. It was argued in the present case that the circumstances are similar to those which led the court in *Meroka* to conclude the Tribunal had erred in that case when it decided declarations of competent persons did not comply with the Regulations.

51. An issue was raised by the First Respondent claimed to be a definitive answer to this application namely that the Tribunal had made a finding of fact wherein it found that the Applicant and the nominator were not in a genuine spouse relationship at the time of the application. The Applicant in written submissions sought to challenge the findings of fact relating to the considerations set out in Regulation 1.15A referred to in the Tribunal's decision. Challenges were made to an incorrect reference to the date of marriage where the Tribunal referred to 6 November 2000 rather than 2 March 1999. The financial aspect of the relationship was also the subject of further submissions together with the nature of the household and social aspects of the relationship. Reference was made to various statements relied upon by the Applicant and it was submitted that it was incorrect for the Tribunal to say that there was "no probative evidence that the parties claimed relationship is genuine and continuing". The failure to consider relevant evidence amounted to a jurisdictional error. The relevant evidence according to the Applicant's written submissions included the following:-

- The sponsor's statement (Court Book p.24) where the nominator stated in part,

*"From the day I was introduced to Avinesh I have liked him and he has become so much a part of my life. We have spent all our*

*time together since he arrived and we have a lot of things in common.*

*... Avi is a very nice guy and I am glad he is my husband. He is very committed to me as I am to him and we have strong feelings to each other.*

*We are looking forward to a life time of fun and happiness as wife and husband and I request your Department to be considerate towards his application so I can spend the rest of my life with him”.*

- The Applicant’s statement (Court Book pp.25-26) where the Applicant states in part, after describing shared activities,

*“We positively state to your Department that our relationship is genuine and continuing and we are looking forward to an exciting future ahead of us”.*

- Statutory Declarations of Rishi Ram and Virendra Pratap Singh (Court Book pp.33-37) where respectively the following statements appear,

*“I strong believe Avinesh and Sandhya’s relationship is genuine and continuing. As a regular visitor to the family I have seen the relationship blossom.*

*Both Avinesh and Sandhya come from traditional backgrounds thus I have utmost belief that they will have to the traditional Hindu custom and beliefs and will fulfill their commitment to each other in entering a life time relationship by way of traditional Hindu marriage.*

...

*I am sure this relationship is genuine. I was present when they were being introduced to each other and was present at their engagement. The date set for their wedding is set for 10 April 1999 which is ceremonial.”*

- Statements of Mrs Brenda Rattanatray, Anish Kumar, Shobna Kumar, Ayga Ram and Kushma Wati all of which were not included in the Court Book save for reference in the letter from the Applicant’s agent to the Tribunal dated 16 December 2004 (Court Book pp 64-65).

- The Applicant's own evidence at the Tribunal hearing as follows:-

*"... I noticed – the first six weeks were very good. I had no complaints but it was after I started working this third or the fourth week of my working that I noticed she started changing her attitude towards me."*

52. (Page 2 Supplementary Court Book lines 10 and 13)

*"Nothing wrong with that. She was quite happy with that as the time? ---Yes, yes. I spent the whole day with her. We went for a drive and we did like things and then we – when we came back it was after dinner that the – all the family, everyone was together, and her dad asked her in front of everybody what do you think of Avinesh, if you liked him, and she said yes and her dad said just be sure because this is – you know, this is a serious thing, it's getting married so you be sure of yourself. And she said, yes she has no problem with it and then looked to me and I gave my consent as well.*

...

*..., my dad said he would help us as well, we would – we were going to buy our own house and we had like a two year plan sort of thing."*

53. (Page 4 Supplementary Court Book lines 6-16 and 22-24).

*"... If I fell in love with a – a girl who hasn't been married before she would have trouble telling her parents about me because I've already been married once and in our custom it – it carries a lot of weight a person already being married once. So it's like I've been blemished because of what happened during those years."*

54. (Page 7 Supplementary Court Book lines 25-31).

55. It was submitted on behalf of the Applicant that it is incorrect for the Tribunal to claim that there was "no probative evidence".
56. As I understood the Applicant's submissions, criticism was made of the Tribunal when it made a finding that there was no genuine relationship at the time of the decision on the basis that it was not necessary for it to make that finding in order to discharge its obligations in relation to Regulation 820.221(3).

57. It was further submitted that at no stage did the Tribunal put to the Applicant that there was an absence of probative evidence in relation to the genuineness of the relationship. In addition it was never put to the Applicant that “Dhillon’s case” was relevant. The reference to Dhillon’s case is set out in the extract from the Tribunal’s decision which appears in paragraph 25 of this judgment.

### **First respondent’s submissions**

58. The substantive submission made on behalf of the First Respondent was that the domestic violence exception is only relevant where there has been a spousal relationship at the time that the visa is applied for and then that that relationship at some time after the application ceases because of domestic violence as established in accordance with the Regulations. It was submitted if there has never been a spousal relationship at all or relevantly at the time of the application, the application will fail, even if the domestic violence exception is established.
59. The critical finding in this case upon which the Tribunal’s decision was based was not that the Applicant and the nominator were not in a genuine spouse relationship at the time of decision, that was accepted five years or over five years after the relationship ceased when the Tribunal was assessing the particular scenario. There was no question that there was not a spousal relationship at the time of the decision. It was submitted that the Tribunal found, however, there was never any genuine spousal relationship, that is, the marriage was never genuine. Hence at the time of the application the Applicant was not the spouse or nominator. The relevant dates being that the Applicant arrived in Australia on 16 January 1999 and entered into what was described as an arranged marriage on 2 March 1999.
60. It was noted that the application for visa was made on 29 March 1999 and that is the relevant date of assessment. In June 1999, within three months of the application, the nominator withdrew her sponsorship and claimed in withdrawing the sponsorship that the marriage was arranged, that she was forced into it and had been in a relationship with another man throughout that period. It was submitted in those circumstances the Tribunal has looked at all of the evidence, has

addressed the considerations set out in Regulation 1.15A which provides for a range of matters that are relevant to considering whether or not the persons are in a married or de facto relationship and has concluded that the Applicant does not meet the definition of "spouse" at the time of application.

61. Reference was made to the Tribunal's findings under the heading 'Genuine Relationship' which appears just before the conclusion and after the Tribunal's findings concerning domestic violence. In particular counsel referred to paragraphs 20 and 21 of the Tribunal decision set out below:-

*"20. The visa application is conditional on the visa Applicant meeting the definition of 'spouse', a core criterion for the visa that is defined in regulation 1.15A. It provides that the Tribunal must be satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others (regulation 1.15A(1)(b)(i)), that the relationship is genuine and continuing (regulation 1.5A(1)(b)(ii) and that they do not live separately and apart on a permanent basis (regulation 1.15A(1)(c)(ii). In this context the decision of the Full Federal Court in Dhillon's case is relevant. It comments on the test for a genuine marriage, adopting the words of Street C.J. in Cahill's case at page 458 that the correct test is that the parties 'have a mutual commitment to a shared life as husband and wife to the exclusion of others'. The only proper course, therefore, is to follow the regulations and apply them to the facts, excluding speculation and notions about idealised marriages from consideration. In the case at issue there is very little evidence that the parties had a genuine relationship as at the time of application, or at the time of decision. Whilst the visa Applicant made claims under the Domestic Violence provisions of the regulations the Tribunal has found against this claim. Consequently the Tribunal must consider the matter without recourse to the domestic violence provisions in regulations 820.211(8) or (9).*

*21. Taking into account all of the evidence, which includes evidence provided to support the visa Applicant's domestic violence claims (this bring pertinent as to whether the visa Applicant is in a genuine spouse relationship with the nominator) and the limited evidence elicited under regulation 1.15A(3) The Tribunal finds that the visa Applicant does not meet the definition of 'spouse' as set out in regulation 1.15A and therefore he does not meet the requirements of regulation 820.211 for the grant of a*

*visa. In that regard it is noted that the visa Applicant was more sinned against than sinning."*

62. The Tribunal had otherwise set out the considerations for a spouse relationship pursuant to Regulation 1.15A in paragraph 19 of its decision set out earlier in this judgment.
63. It was submitted by the First Respondent that the Tribunal looked at the question and reached a finding of fact. It was submitted that the Tribunal's decision is independently supported by its finding that the Applicant was not the "spouse" of the nominator at the time of application, hence irrespective of the application of the domestic violence provisions the Tribunal found the Applicant did not meet the requirements of clause 820.211. It was therefore strictly unnecessary for the Tribunal to consider whether the Applicant had suffered domestic violence within the meaning of division 1.5 of the Regulations. The Applicant was required to establish that he was in a married relationship within Regulation 1.15A at the time of the application in March 1999 and, according to the First Respondent's submissions, had failed to do so. The Tribunal found the Applicant did not meet the definition of "spouse" contained in Regulation 1.15A and made that finding free of any error. The finding by the Tribunal where, after considering the background, it states, "I don't consider, at least from the nominator's point of view, that she was ever committed to a genuine relationship," was a finding of fact not challenged. The suggestion that it is an irrelevant finding is not sustainable as, in the absence of some error being shown or some basis shown upon which the finding can be impugned, then it was submitted that is the end of the matter for the purpose of this Tribunal decision.
64. The First Respondent submitted that the additional submissions from the Applicant in relation to this issue seek to simply review the merits of the Tribunal of fact which is impermissible. The Tribunal, it was submitted, asked itself the correct question, namely whether at the time of the application the Applicant and the nominator had a mutual commitment to a shared life as husband and wife to the exclusion of all others, were in a genuine and continuing relationship and lived together or not separately and apart on a permanent basis (see Regulation 1.15A(b)). Hence, the Tribunal addressed each of the matters set out in Regulation 1.15(3) of the Regulations. It was open on the material



before the Tribunal for it to find that the Applicant did not meet the definition of "spouse" at the time of the application. That assessment of the evidence was a matter for the Tribunal.

65. Reference by the Tribunal to there being "little evidence" or "no significant evidence" or "no probative evidence" represents no more than the outcome of the Tribunal's assessment to the extent and weight of the evidence before it. Those findings fall within the fact-finding province of the Tribunal according to the First Respondent's submissions. The matters raised by the Applicant in written submissions concerning the facts were taken into account by the Tribunal and it was submitted there is no indication the Tribunal failed to take into account those matters and it made specific reference to the "letters of support". Statements from various witnesses did not contain strong evidence that the Applicant and the nominator were in a genuine "spouse" relationship at the time of the application. The Tribunal took those statements into account in relation to the "social aspects of the relationship". It was submitted the amended application does not contain any grounds of review directed to the Tribunal's finding that the Applicant was not a spouse at the time of the application and did not satisfy clause 820.211.
66. In relation to the domestic violence issue, reference was made to the relevant regulations and to the decision of the Federal Court in *Meroka*. It was submitted in the present case it was open for the Tribunal to find that each of the statutory declarations did not satisfy the requirements of Regulation 1.26. In particular it was submitted that neither Ms Deo or Dr Krishnamurthi referred to the Applicant having the necessary fear or apprehension for his personal well being or safety. In order to satisfy Regulation 1.24(1)(b) the Applicant required at least two statutory declarations by competent persons. It was submitted the Tribunal asked itself the correct questions, namely whether the statutory declaration satisfied the requirements of Regulation 1.26 and its decision did not involve any jurisdictional error (see *Cakmak v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 257 (*Cakmak*) at [53]-[55] and *Kozel v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 658 (*Kozel*) at [44]-[46]).

67. It was noted in *Sok v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 56 (*Sok*) a majority of the court disapproved of statements that had been made by a differently constituted Full Court in *Cakmak*. In *Sok*, Branson J, with whom Marshall J agreed, concluded that "relevant domestic violence" is not restricted to physical violence. However, reference was made to the majority in *Sok* that inherent "in the notion of violence, whether physical or non-physical is an element of vehemence or severity" at [26].
68. It was submitted in the present case that there was nothing in the Tribunal's reasons to indicate that it imposed a requirement that domestic violence must involve physical violence. It was submitted that it was relevant for the Tribunal to consider the nature of the violence described and the evidence on which the competent person's opinions were based in order to determine whether the violence or the evidence was capable in law of amounting to "relevant domestic violence" within the meaning of Regulation 1.23(2)(b).
69. In any event the question of whether "relevant domestic violence" could extend to non-physical violence was not material to the Tribunal's decision. The Tribunal found that the declarations of Ms Deo and Dr Krishnamurthi did not address whether the nominator's conduct caused the Applicant to have a fear of apprehension for his personal well being or safety. The Tribunal is entitled to insist upon a strict observance of the requirements contained in Regulation 1.26. Reference was made to the decision of Gray J in *Cakmak* where his Honour states the following:

*"40 The primary judge described the approach of the Tribunal, relevantly, at [27] and [29] to [31] of his reasons:*

*[27] The Tribunal took the view that the Applicant's evidence about the incident was contradicted by evidence from a physician who saw the Applicant in connection with that incident on 5 December 1999. It noted the Applicant's claim that physical violence was confined to one incident and that he and the sponsor lived together contentedly for three months from shortly after the date of the incident until March 2000. This raised in the Tribunal's mind the question whether the alleged domestic violence was sufficiently serious to exempt the Applicant from meeting the usual*

*requirements of the class of visa he had applied for. The Tribunal noted that the Applicant did not make a claim of domestic violence until after the sponsor had withdrawn her sponsorship. It noted the extensive evidence, including the intervention order made on 6 April 2000, claiming that the Applicant had perpetrated domestic violence against the sponsor, which it found contradicted the statements made in his statutory declaration. Although it could not take this evidence into account in considering whether domestic violence had been committed against the Applicant, it took the view that the Applicant had put his credibility in contention. It found that his evidence could not be relied upon. It expressed reservations about whether his claim that he was concerned for and fearful for his own personal wellbeing and safety was true. It found that the allegations of domestic violence made by the Applicant were not of such seriousness as to constitute domestic violence sufficient to warrant an exemption from the general requirement that there be a genuine and continuing marriage relationship at the time of decision.*

...

*[29] With respect to the two statutory declarations of Ms Guducu, the Tribunal pointed out that the evidence on which her opinion was based depended on the consistency of the Applicant's own account over the sessions when he was seen by Ms Guducu. The Tribunal considered this to be less than consistency between a person's presentation and their account of domestic violence. The Tribunal referred to the fact that Ms Guducu had seen the Applicant on four occasions in May 2000, nearly six months after the alleged incident. Accordingly, the Tribunal found that the evidence on which Ms Guducu's opinion was based did not meet the requirements of reg 1.26.*

*[30] With respect to Ms Sozer's opinion, the Tribunal found that it was based on self-report by the Applicant and that the attribution of physical symptoms to the domestic abuse was not warranted by the evidence available to the social worker. Again, the Tribunal pointed out that mere consistency was not sufficient, because the reported account may be equally consistent with another event. The Tribunal found that the evidence on which Ms Sozer's opinion was based did not meet the requirements of reg 1.26.*

*[31] The Tribunal made a similar finding with respect to Dr Munir's opinion. It pointed out that this opinion was based upon Dr Munir's "feeling" that the Applicant was truthful and on the consistency between the Applicant's story, his report of anxiety/depression and a history of abuse. The Tribunal pointed out that Dr Munir had seen the Applicant about six months after the alleged incident. It again made the point that the observation of consistency was not sufficient when the reported account may be equally consistent with another event. It noted a similarity between the symptoms reported by Dr Munir and those noted six months earlier by another medical practitioner, in which the Applicant had said he was worried about going back to Turkey and complained of insomnia."*

70. It was submitted that it does not matter that the Applicant's declaration satisfied the Regulations in circumstances where there is a deficiency or absence of complying declarations by competent persons.

## **Reasoning**

71. I accept that a critical threshold issue for determination by the Tribunal was whether it was able to find that at the time of the application the visa applicant could properly meet the definition of "spouse" defined in Regulation 1.15A of the Regulations. In reaching that decision the Tribunal is entitled to have regard to the material presented including statements and evidence of the Applicant.
72. It is entitled to consider those matters set out in Regulation 1.15A(1A) set out earlier in this judgment. In considering whether there is a genuine and continuing relationship I do not see any error in the principles to be applied to the facts relied upon by the Applicant.
73. If the finding of fact in relation to whether or not the Applicant is in a genuine spouse relationship with the nominator is a finding reasonably open then it cannot be a finding which therefore gives rise to jurisdictional error.
74. I accept the submissions made for and on behalf of the Applicant that the critical time for making a finding concerning the genuine relationship is that at the date of the application and that it is unnecessary to make any finding as to whether or not a genuine

relationship existed at the time of the decision by the Tribunal. By making that finding as the Tribunal clearly did does not however give rise to a finding of jurisdictional error where the Tribunal clearly made the additional finding that it was not satisfied that there was a genuine relationship as at “the time of the application”. By adding the words, “or at the time of the decision” the Tribunal has simply embarked on a further finding which I accept is unnecessary but not sufficient to constitute jurisdictional error.

75. In my view the Tribunal was entitled to reach a conclusion that there is “very little evidence that the parties have a genuine relationship as at the time of application”. That much is clear from appropriate authorities as to the manner in which a Tribunal may approach its fact finding task. However, in this case the Tribunal went further when it stated, “There is no probative evidence that the parties claimed relationship is genuine and continuing”. It made that specific finding no doubt in direct response to its obligation to make that finding pursuant to Regulation 1.15A(1A)(b)(ii) of the Regulations. In my view by asserting there is ‘no probative evidence’ the Tribunal has clearly fallen into error as it has failed then to assess the evidence which although perhaps ultimately rejected could not be described as constituting ‘no probative evidence’. The detailed reference to the evidence set out in the Applicant’s submission of parties upon whom the Applicant relied at the very least was relevant probative evidence which the Tribunal was bound to take into account even if ultimately rejecting that evidence. To suggest that that evidence justifies a conclusion that there is ‘no probative evidence’ means in my view that the Tribunal has failed to take into account relevant material directed to an integer of the case namely whether the Applicant was in a genuine and continuing spousal relationship with the nominator at the time of the application. That failure in my view is sufficient to constitute jurisdictional error.

76. In considering the issue of jurisdictional error I adopt and apply the following passage from the Full Court of the Federal Court decision in *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 where the Court states:-

*“16 It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description*

*of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57.”*

77. Any jurisdictional error detected must affect the exercise or purported exercise of power in order to provide a proper basis upon which the Court should intervene by way of judicial review. A failure to take into account a relevant consideration would not of itself constitute an error unless it was a consideration that the Tribunal was bound to take into account (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).
78. Accordingly in my view it is appropriate the decision of the Tribunal be quashed and remitted to a differently constituted Tribunal to be determined according to law.
79. In relation to the issue of domestic violence I accept the submissions made for and on behalf of the Applicant that if the Tribunal were to make a finding of a genuine spousal relationship at the time of application and then proceeded to consider the issue of relevant domestic violence when considering the relevant issues set out in the Regulations. I note and apply the decision of Ryan J in *Meroka* referred to earlier in this judgment.
80. In the present case it is noted the Tribunal stated that under the Regulations “the determination that a person has suffered domestic violence is in the hands of a ‘competent person’ as defined by

Regulation 1.21”. The Tribunal accepted that the relevant witnesses complied with the Regulation but then during the course of its recital of the evidence in paragraph 13 of its decision simply inserts a finding expressed in the following terms,

*“Taking into account the competent persons declarations the Tribunal finds that the visa applicant’s claims do not meet the definition of domestic violence.”*

81. I had difficulty unravelling the Tribunal’s reasoning in relation to this issue although note that it was critical of the declaration from Dr Krishnamurthi for its failure to state that the Applicant sustained any ‘fear or apprehension as a consequence of the alleged actions of the nominator’. The Tribunal considered the evidence of Mr Kleyhans which includes a description of the threat by the nominator to kill the Applicant and the Applicant feeling apprehensive about his welfare and being with the nominator. The Tribunal simply states after noting the Applicant had suffered a major depressive episode and PTSD that “this evidence does not provide that the visa applicant suffered relevant domestic violence as required by Regulation 1.23(2)(b)”. It is difficult to reconcile that finding with the obligation of the Tribunal to properly consider the declaration by the competent witness as required by the Court in *Meroka*. Hence to that extent and if required to do so I would accept the submissions made for and on behalf of the Applicant that there has been jurisdictional error in the manner in which the Tribunal considered and interpreted the relevant evidence and the context of statutory framework relating to domestic violence. It failed to ask itself the question as to whether or not that evidence was capable as a matter of law of supporting the opinion that domestic violence had occurred which in my view it is required to do when analysing a claim of this nature.
82. For the reasons given it follows that the appropriate orders should be made quashing the Tribunal decision and that the First Respondent should pay the Applicant’s costs.

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**I certify that the preceding seventy-nine (79) paragraphs are a true copy of the reasons for judgment of McInnis FM**

Associate:

Date: 5 May 2006